

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
272(b)(1)(1) "Operate Independently"	)	WC Docket No. 03-228
NPRM	)	
	)	

**COMMENTS OF SBC COMMUNICATIONS**

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), hereby respectfully submits its comments on the Notice of Proposed Rulemaking<sup>1</sup> ("NPRM") adopted by the Federal Communications Commission ("Commission") in the above-captioned docket. The NPRM asks whether the Commission should modify or eliminate its rules implementing the "operate independently" requirement of section 272(b)(1). The NPRM questions both rules promulgated to implement that section – the rules that prohibit the sharing of "Operation, Installation, and Maintenance" ("OI&M") between the BOC and BOC affiliates on the one hand and section 272 affiliate on the other, and the rules that restrict joint ownership between the BOC and section 272 affiliate of switching and transmission equipment (and the land and buildings on which they are located).<sup>2</sup> As discussed below, the Commission should eliminate immediately its rules that prohibit the sharing of OI&M services. Although SBC supports lifting the restrictions on joint ownership as well, resolution of that issue should in no way delay the elimination of the OI&M rules.

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<sup>1</sup> *In the Matter of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, FCC 03-272, *Notice of Proposed Rulemaking*, rel. Nov. 4, 2003 (NPRM).

<sup>2</sup> SBC has provided an extensive definition of "OI&M" in its Forbearance Petition and, for the sake of brevity, will not repeat it here. See, *Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation and Maintenance Conditions Contained in the SBC/Ameritech Merger Order*, CC Docket Nos. 96-149 and 98-141, pp. 5-7, filed June 5, 2003 (SBC Petition).

## **I. The OI&M Restrictions Should Be Eliminated Immediately**

The OI&M issue is more than ripe for decision. The excessive costs of these restrictions were brought to the Commission's attention by Verizon in August 2002.<sup>3</sup> Since then the Commission has had before it four separate OI&M Forbearance Petitions from each of the BOCs, with extensive comments and reply comments on each.<sup>4</sup> The record includes literally hundreds of pages of comments, replies, affidavits, and *ex parte* filings that provide overwhelming evidence that these requirements impose enormous costs and provide virtually no countervailing public benefits.

SBC will not waste the Commission's time and resources rehashing the extensive evidence that already is before the Commission. Suffice it to say that the OI&M restrictions do not merely burden the BOCs themselves; they hurt consumers by impairing the BOCs' ability to provide timely, efficient, cost-effective, and reliable service. It is impossible to quantify the intangible costs these restrictions impose in terms of reduced service quality, delayed installation and repair, etc. From SBC's perspective, those costs far exceed the tangible, quantifiable costs of redundant systems and personnel. But the costs of just the redundant systems and personnel add up to tens of millions of dollars annually, so the total costs are far greater.<sup>5</sup>

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<sup>3</sup> Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149, filed Aug. 5, 2002.

<sup>4</sup> SBC hereby incorporates by reference the entire record in the OI&M Forbearance Petitions filed – including the *ex parte* made therein: Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149, filed Aug. 5, 2002; SBC Petition SBC for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation and Maintenance Conditions Contained in the SBC/Ameritech Merger Order, CC Docket Nos. 96-149 and 98-141, filed June 5, 2003; BellSouth Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149, filed July 14, 2003; and Qwest Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149, filed Oct. 3, 2003.

<sup>5</sup> SBC's costs, for its Data Services Affiliates alone, are \$77 million annually. Verizon estimates the costs at over \$300 million over four years. *See, SBC Petition* at 20; *See also, Ex Parte Letter* to Marlene Dortch, FCC, from Dee May, Verizon, dated June 24, 2003.

Not only are the costs of the OI&M restrictions exorbitant, they offer virtually no public benefit. To be sure, the BOCs' competitors trot out their usual stock claims of discrimination and cross-subsidization. They fail completely, however, to demonstrate any coherent real-world basis for either of these concerns. The Commission has itself recognized that price-cap regulation has eliminated any threat of cross-subsidization, and the purported risk of any undetected discrimination is speculative and remote.<sup>6</sup>

Indeed, the only real competitive harm at stake in this proceeding is the competitive harm that *results from* the OI&M restrictions, not any ostensible harm that those restrictions prevent. The BOCs' principal competitors in the market for data and other business services are not subject to any of the OI&M restrictions that apply to BOCs. Unlike the BOCs, they may, therefore, serve their customers in a seamless and efficient manner, using a single set of engineers, technicians, support staff, customer service representatives, and data base systems. This is a key competitive advantage of which the BOCs' competitors are keenly aware, and which those competitors regularly tout to Wall Street. In AT&T's own words "... the Bells lack the breadth of product such as consulting services, security, network management as well as the lack of human capital to succeed in taking a share [of the enterprise market]."<sup>7</sup> And further, "With our integrated networking solutions, businesses no longer have to patch together disparate services from multiple providers."<sup>8</sup> While the OI&M restrictions may serve the private interests of competitors that seek to insulate themselves from competition, they do not serve the public interest. The record is clear on this score, and the Commission should so rule without delay.

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<sup>6</sup> BOCs have documented in detail their processes for provisioning, installation and repair, and it is clear that - given the largely automated nature of these processes, the numerous non-discriminatory procedures already implemented by the BOCs, and other safeguards including the nondiscrimination requirements of sections 201 and 202, performance measures required by Interconnection Agreements and the *Non-Accounting Safeguards Order*, and the Commission's extensive enforcement authority - there is simply no basis for any concern that the elimination of OI&M restrictions will harm competitors in any manner.

<sup>7</sup> Banc of America Securities, Equity Research Brief – Wireline Competition, "AT&T Corporation – Defending Business; Ready a Consumer Counter-Attack," p. 6, Nov. 13, 2003.

<sup>8</sup> See, SBC Reply Comments in Support of Petition for Forbearance and Modification, CC Docket Nos. 96-149 and 98-141, p. 23, filed July 15, 2003 (*SBC Reply Comments*).

Although the record demonstrates that the OI&M rules should be repealed, in the event that the Commission does not eliminate these rules it should clarify that these rules do not restrict the sharing of OI&M services among SBC's Data Services Affiliates.<sup>9</sup> The OI&M restriction is a result of section 272(b)(1), which requires a section 272 affiliate to operate independently of the "*Bell Operating Company*."<sup>10</sup> Even though the above statute does not require the long distance affiliate to operate independently from a BOC affiliate, the Commission, in implementing this provision, determined to restrict both a *BOC and BOC affiliates* from performing OI&M functions for a section 272 affiliate.<sup>11</sup> In rejecting BellSouth's Petition for Reconsideration of this rule, the Commission explained the purpose of the rule. It stated that it had included BOC affiliates within the scope of the rule because 'allowing a third affiliate to provide such installation and maintenance services would, in essence, create a loophole around the separate affiliate requirement.'<sup>12</sup> In other words, the Commission was concerned that the third affiliate would, in effect, be a sham affiliate, used to end-run around the OI&M restriction.

However, in SBC's case, the SBC Data Service Affiliates cannot possibly be characterized as "sham" affiliates. These affiliates are substantially separate from the BOCs. Each affiliate is a distinct corporate entity with officers, directors and employees that are separate from the BOCs. In addition, each maintains books, records, and accounts that are separate from the BOCs. None of these affiliates provides any OI&M services to the SBC

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<sup>9</sup> The SBC Data Services Affiliates fall into the following categories: SBC Long Distance, Inc. (SBC's section 272 long distance affiliate); SBC Advanced Solutions, Inc. (SBC's advanced services affiliates); SBC DataComm (SBC's data equipment and customer network management affiliate); SBC Internet Services (SBC's Internet access affiliates); and SBC Telecom (SBC's affiliate for the provision of out-of-region services); and SBC IP Communications (SBC's affiliate for the provision of voice over Internet protocol services); and SBC E-Services (which provides web hosting and Internet data centers).

<sup>10</sup> 47 U.S.C. section 271(b)(1).

<sup>11</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, ¶163 (1996) (*Non-Accounting Safeguards Order*).

<sup>12</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, *Third Order On Reconsideration*, 14 FCC Rcd 16299, ¶20 (1999).

BOCs, and, except in very limited circumstances, none receives OI&M services from the BOCs. To the limited extent that they receive any OI&M services from the BOCs, they do so pursuant to affiliate transactions and the Commission's accounting rules. Thus, sharing of OI&M services among the SBC Data Service Affiliates raises none of the concerns highlighted by the Commission and, as requested by SBC in its OI&M Forbearance Petition, if the Commission does not promptly eliminate the OI&M restriction altogether, it should issue a declaratory ruling clarifying the same.<sup>13</sup>

A majority of the Commission already has acknowledged the significant costs of the OI&M rules and has signaled its inclination to repeal those rules. In the News Release denying Verizon's OI&M Forbearance Petition on legal grounds and adopting the current NPRM, Commissioner Martin advocated a "tentative conclusion" to eliminate the rules. Commissioner Abernathy stated her tentative position that the substantial costs imposed by this rule substantially outweigh its benefits, and Chairman Powell stated that he hoped to conclude the rulemaking "expeditiously."<sup>14</sup> More recently, Commissioner Abernathy once more urged to "promptly" complete this current rulemaking. And she has clearly stated that, "Dominant carrier regulations, the OI&M rule, and other legacy regulations may not be necessary in today's increasingly competitive marketplace."<sup>15</sup>

Consistent with these views, SBC urges the Commission to eliminate the OI&M rules as quickly as possible. The Commission also should make clear that because it is impossible to separate the OI&M functions associated with intrastate services from the OI&M functions associated with interstate services, any state restrictions on the sharing of OI&M functions

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<sup>13</sup> See, *SBC Petition*, See also, *Ex Parte Letter* to Christopher Libertelli, FCC, from Gary Phillips, SBC, dated Oct. 29, 2003.

<sup>14</sup> FCC News Release, *Commission Denies Verizon Petition Requesting Forbearance from Application of the Operating, Installation & Maintenance Sharing Prohibition*, rel. Nov. 3, 2003.

<sup>15</sup> See, Separate Statement of Commissioner Kathleen Q. Abernathy in *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, FCC 03-309, *Memorandum Opinion and Order*, rel. Dec. 3, 2003.

necessarily would be inconsistent with the Commission's section 272 rules and, therefore, under the *Non-Accounting Safeguards Order*, impermissible.<sup>16</sup>

## **II. The Joint Ownership Prohibition Should Also Be Eliminated**

Like the OI&M restrictions, the joint ownership prohibition serves only to handicap the BOCs and their customers while providing little or no countervailing benefits. While the negative effect of this prohibition is, to a certain extent, mitigated by the Commission's decision to allow joint use of equipment and facilities, the inability of section 272 affiliates to jointly own facilities unnecessarily adds to the cost of doing business. With ownership of a facility comes some measure of control over how it is configured and used. Affiliates who jointly own equipment thus can more effectively eliminate the need for redundant equipment. Conversely, affiliates that are not permitted to own equipment jointly may be forced to purchase their own equipment precisely because of the need to maintain control over configuration and use. As services, particularly data services, become more complex and customized, these considerations become ever more significant. The joint ownership restriction thereby will increasingly add to the costs and inefficiencies of the network – costs that, as discussed above, must necessarily be recovered from consumers. These costs and inefficiencies – imposed on BOCs but on none of their competitors – can no longer be justified in today's economic environment where BOCs are struggling to control expenses and achieve efficiencies to compete with cable, wireless, and large IXC's with ubiquitous networks.

Lifting the joint ownership prohibition will not affect any of the BOCs' existing wholesale obligations towards IXC's. These safeguards – which have been documented in detail by the BOCs in the OI&M and other proceedings - combined with the enforcement power of the Commission, should conclusively set to rest competitors' spurious objections to the elimination of the joint ownership prohibition as well.

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<sup>16</sup> *Non-Accounting Safeguards Order* at ¶30 ; See also, Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 1619 (1992) (*Memory Call Order*).

### **III. The Section 272(b)(1) “Operate Independently” Language Imposes A Qualitative, Not Quantitative Standard.**

The Commission asks, in the NPRM, how elimination of both - the joint ownership and the OI&M Restrictions – relates to its conclusion in the *Non-Accounting Safeguards Order* that the “operate independently” language of section 272(b)(1) imposes separate and independent restrictions on section 272 separate affiliates beyond those detailed in section 272(b)(2)-(5).<sup>17</sup> The Commission asks, further, if it should implement any additional safeguards under this section.<sup>18</sup>

SBC agrees with the Commission’s basic premise in the *Non-Accounting Safeguards Order*, that each section of the statute should be presumed to have some meaning. However, it does not agree that the term “operate independently” therefore requires separate and additional regulations. When Congress intended to establish identifiable safeguards it did so clearly, as with the safeguards specified in sections 272(b)(2)-(5). Because it did not identify any specific safeguards for 272(b)(1), it necessarily left this requirement as a qualitative standard to guide the Commission in its application of the more specific requirements in sections 272(b)(2)-(5). For this reason, the Commission should also not seek to impose any additional regulations under Section 272(b)(1).

### **IV. CONCLUSION**

As Chairman Powell has stated:

if we don’t have a clear and demonstrable justification of a rule, then the appropriate role of government is to take the rule away or not interfere in the otherwise proper functioning of a market, rather than leave a rule in for good measure. Over history a lot of rules that were left for good measure . . . have secondary effects that often harm the welfare of consumers. . . . I don’t think you’ve got to prove to me that a rule is not necessary. I think I have to prove that it is necessary. And if I can’t do that, I don’t think that I should intervene.<sup>19</sup>

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<sup>17</sup> NPRM at 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Powell Defines Stance on Telecom Competition*, Comm. Daily, May 22, 2001, at 2-3.

The BOCs have already demonstrated extensively that there is no justification for the OI&M rules. The regulatory burdens and excessive costs imposed by these rules, which can be destructive in any business environment, are particularly pernicious today when the economy is mired in recession. The Commission should grant relief from the OI&M restrictions and it should do so immediately. Although the joint ownership restrictions should be eliminated as well, resolution of that issue should in no way delay relief from the OI&M restrictions.

Respectfully Submitted,

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